

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FLAME CONTRACTING, INC.

and

Case 5-CA-25745

WASHINGTON D.C. BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO

Thomas P. McCarthy and Eileen Conway, Esqs., for the
General Counsel.

Craig F. Ballew, Esq., for the Respondent

Mr. A. Keith Wagner for the Charging Party.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge: This case was tried in Baltimore, Maryland, on August 18, 19, and 20, 1997. The charge was filed on October 25, 1995,¹ and was amended on July 19, 1996. The complaint was issued on August 15, 1996. The complaint alleges a threat of refusal to hire, two instances of interrogation, and a threat of termination in violation of Section 8(a)(1) of the National Labor Relations Act and the refusal to consider for hire, and to hire, eight applicants for employment in violation of Section 8(a)(3) of the Act. Respondent's timely answer, as amended at the hearing, denies any violation of the Act.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the business of insulation contracting from its facility in Baltimore, Maryland, where it annually performs services valued in excess of \$50,000 for customers outside the State of Maryland. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Washington D.C. Building and Construction Trades Council, AFL-CIO, the Charging Party, International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 11, the Union or Local 11, and International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 24, Local 24, are labor organizations within the meaning of Section 2(5) of the Act.

¹ All dates are in 1995 unless otherwise indicated.

² The transcript does not reflect receipt of GC Exh. 21 and Resp. Exh. 7. They are received.

II. Alleged Unfair Labor Practices

A. Background

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Flame Contracting began operating in 1989. Its president, Drew Paff, was a member of Local 11 from 1982 until 1992. Flame was formerly a union contractor. Paff has known Keith Wagner, who became the business agent of Local 11 in October 1991, for about 15 years. Wagner had worked for Paff for a short time in 1989, and he had been involuntarily laid off from a job by Paff.³

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Shortly after Wagner became business agent, Flame repudiated its 8(f) contract with Local 11. Business agent Wagner filed a petition for an election, and an election was held in 1992. A majority of Flame's employees in the appropriate unit did not select the Union as their collective bargaining representative. Since that time, Flame has operated as a nonunion contractor. After the loss of the election by Local 11, Paff and his father, Fred Paff, were charged with working for a nonunion company and fined.

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In 1994, Marty Cook and Stanley Zoch were operating Craftmen Insulation, Inc. Craftmen, a union contractor, was plagued by financial difficulties. It became delinquent in contractually required payments to various benefit funds and went bankrupt. Paff agreed to hire Cook, Zoch, and the two remaining Craftmen employees, union members Steve Althoff and Dave Jacobs. In return, Flame obtained all of Craftmen's work in progress. Shortly after he began working for Flame, Cook was approached on the job by Wagner. Wagner informed Cook that he was violating the union's bylaws by working for Flame, a nonunion contractor. As the conversation ended, Wagner stated, "[T]ell Drew [Paff] I'm going to get him." In early 1995, on February 9, Wagner went to Flame's office where he questioned Zoch regarding why he had gone to work for Flame. He referred to Paff in an unflattering and vulgar term, and he stated that he was "going to get Drew's father." Shortly after this, Fred Paff's union pension was suspended.⁴

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In addition to Wagner's animosity towards Paff, the record establishes dissension in Local 11. Prior to 1995, Local 11 operated in the Baltimore area and Local 24 operated in the Washington D.C. area. On October 1, Local 11 merged with Local 24, and Local 11 ceased to exist. Some members of Local 11 had become upset when they learned of the forthcoming merger. In July 1995, John Grabowski, who had been treasurer, vice president, and an executive board member of Local 11, advised Wagner that, due to his opposition to the merger, he was going to leave the Union. Grabowski sought work at Flame, and he was hired on July 27. Shortly thereafter, Local 11 filed internal charges against him.

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Wagner confirmed that Local 11 encouraged members to seek employment with nonunion contractors when sanctioned by the Union. He testified that, if a union member worked for a nonunion employer without union sanctioning, it was the union's policy to file internal charges against the member and take executive action. The record confirms that such action was uniformly taken against union members who accepted employment with Flame,

³ The record does not establish that Flame was the union contractor that employed Wagner; it establishes only that Paff was responsible for the layoff.

⁴ Due to Fred Paff's age, this action was not privileged. The pension was reinstated, and Fred Paff sustained no actual financial loss.

including Grabowski and Brian May, who was hired by Flame on June 5.⁵

Flame has continued to hire union affiliated applicants, including Maurice Jiggets, Francis Hicks, and Joseph Zinzer. Flame has never sought to have any employee relinquish his union membership. Rather, employees have relinquished their membership after the Union has instituted executive action against them.

B. Facts

On July 23, Flame Contracting, the Respondent, advertised for insulators in the Sunday edition of the Baltimore Sun newspaper. On July 25, Wagner accompanied four insulation mechanics who were members of Local 11, Raymond Forster, Kenneth Cain, Ted Wilson, and Michael Abbott, to Respondent's office where Forster, Cain, Wilson, and Abbott completed applications for employment. Wagner photographed the application process. On their applications, in response to a question relating to activities, Forster and Cain stated that they were volunteer union organizers. All four applicants showed Local 11 as their most recent employer, neglecting to name the actual companies for which they had worked. Paff called Wagner and advised him that the applications were incomplete. Wagner asked if he could send in some more applications, and Paff stated, "[S]ure." By letter dated July 26, Wagner forwarded to Respondent the applications of insulation mechanics and Local 11 members Jerry Spurlock, Kenneth Neal, Robert Booz, Albert Beyer, Sr., and Albert Beyer, Jr., all of which, in response to the question relating to activities, state "volunteer union organizer." The letter forwarding the applications states that the applicants "are willing to accept immediate employment under your terms and conditions of employment."

On July 26, Paff and Zoch interviewed Wilson. Wilson had worked with Zoch. In the course of the interview Paff noted that the starting wage would be \$11.00 an hour and confirmed that Wilson had no problem with that. Wilson had not identified himself as a volunteer union organizer. Near the close of the interview, Wilson stated that he would be organizing, and Paff told him that he had no problem with that, "just as long as he did it on his time, break times, coffee times and lunch times." In the course of the conversation, Paff noted that he had worked hard to get where he was and he was going to hire four or five people that were "not going to do any harm to his company or his house."⁶ Union members, as opposed to nonmembers, were not discussed.

On July 27, Paff and Cook interviewed Forster. Forster had worked with Cook. In the interview there was discussion of Forster's experience, particularly his certification as a supervisor for asbestos removal. Paff told Forster that his starting rate of pay would be \$11.50

⁵ In 1992, Marty Cook advised Wagner that Roy Gruber was performing work for Arctic Insulation, a nonunion contractor. There is no evidence of executive action against Gruber.

⁶ Wilson testified that, at the beginning of the interview, Paff asked what the Union was trying to do to him. The complaint did not allege this question as interrogation in violation of Section 8(a)(1) of the Act. General Counsel, in his brief, refers to this question as interrogation and couples it with Paff's later statement relating to his company and house. The two remarks are totally separate in Wilson's testimony. Paff denied asking if Wilson knew what Wagner, business agent of the Union, was trying to do to him, and I credit him. Even if I were not to credit Paff's denial, I would find that the question reflected Paff's personal concern regarding the activities of Wagner, who had told Cook that he was going to "get" Paff and who had been instrumental in having Fred Paff's pension suspended after he told Zoch that he was going "to get Drew's father." It did not relate to Wilson, and it was not coercive.

an hour. Paff noted that Forster had identified himself as a volunteer union organizer and told him to do it at lunch time and on his own time. Paff told Forster that he was going to hire him and would call him. Forster returned to the union hall after the interview. He was present when Wagner received a call from Paff. Wagner put the call on the speaker phone and Forster heard Paff tell Wagner that he had hired Forster. Thereafter, Paff tried to contact Forster twice, on two different days, but received no answer on his telephone. Forster never attempted to contact Respondent, nor did he request Wagner to contact Respondent on his behalf.

On July 28, Paff interviewed Cain. Cook joined the interview after it began, as did Zoch. Paff indicated that his starting pay at Flame would be \$11.00 per hour. Paff noted that Cain had written union organizing as an activity, and Cain assured him that he would be organizing on his own time, before or after work. Paff stated that he had no problem with that. Cook discussed the need to take breaks on schedule and not waste time, that he did not want any problems or headaches.⁷ Cook asked if Cain would have any problems with Local 11, and Cain responded that he would not since Local 11 was aware that he was there to try to organize. Paff stated that “he would get in touch with” Cain. Thereafter Respondent tried several times to contact Cain by telephone, but there was no answer. Cain testified that the family did not have an answering machine. After these several attempts, Paff called again. The telephone was answered by a female. Paff stated that he was Flame Contracting and requested that Kenny Cain call back.⁸ Cain did not receive this message. He never attempted to contact Respondent, nor did he request Wagner to contact Respondent on his behalf.

Abbott was also interviewed on July 28 by Paff and Cook.⁹ Cook asked if Abbott was aware of what could happen to him as a result of working for a nonunion contractor, relating his experience. Abbott replied that it was “taken care of.”¹⁰ Paff told Abbott that he was free to organize on his own time, lunch time and break times.¹¹ Abbott attempted to contact Flame once, on or about August 1, but there was no answer when he called. He did not try again.

On August 2, Paff called Albert Beyer, Jr., whose application has been sent to

⁷ General Counsel, in brief, asserts that the comment regarding problems or headaches related to Cain’s projected organizational activity. There is no complaint allegation in this regard. I credit the mutually corroborative testimony of Cook and Paff that Cook told Cain he did not want to find people going to lunch early, or working through lunch and then leaving early, he did not want any problems or headaches. This did not relate to organizational activity.

⁸ I credit Paff. Although Cain’s wife and daughter both testified that they never received a call for Cain from Respondent, I find that neither recall receiving a call. I note that Mrs. Cain also testified that the family does have an answering machine, whereas Cain testified that there was no answering machine.

⁹ Abbott places Zoch in the interview as well, but he attributes no comments to him.

¹⁰ I do not credit Abbott’s testimony that he stated that he did not know what happened to members who work for nonunion contractors.

¹¹ I do not credit Abbott’s testimony that either Paff or Cook asked what “Keith [Wagner] was trying to do.” The complaint contains no allegation to this effect. In brief, General Counsel argues that this constituted interrogation; however, General Counsel does not address Abbott’s inconsistent testimony regarding who asked the alleged question. Abbott first attributed the question to Paff, but his pretrial affidavit states that Cook, in the course of the interview, simply commented that he, Cook, was not sure what Wagner was trying to do. After being confronted with the affidavit, Abbott revised his testimony and asserted that Cook asked him if he knew what Wagner was trying to do. I do not credit Abbott’s contradictory testimony.

Respondent by Wagner on July 26. Beyer indicated that he could not get to an interview that day, and so an appointment was made for 6:00 a.m. the following morning, August 3, before Beyer, Jr., was to report to the job upon which he was then working. At the interview, Beyer, Jr., stated that he was there to organize. Paff replied that organizing would be no problem as long as he did it during lunch time, break time, or on his free time. I do not credit the testimony of Beyer, Jr., that Paff told him that, if his organizing got too ridiculous, he would have to get rid of him. Both Paff and Cook credibly testified that no comment about terminating Beyer, Jr., if his organizing got too ridiculous was made. Beyer, Jr., filed a false application upon which he stated that he was not employed and could start work "ASAP." His credibility was further diminished when he asserted that, although Paff asked when he could start, he did not believe Paff had offered him a job. I find that Paff told Beyer, Jr., that he was hired and asked when he could start. Beyer, Jr., stated that he was going to be laid off the next day, Friday, that he would start on Monday. On Monday, August 7, Beyer, Jr., did not report to work. Respondent was not surprised that Beyer, Jr., had not reported to work because, on the evening of August 3, Beyer, Jr., had called employee Brian May. In that telephone conversation, Beyer, Jr., told May that Paff made some derogatory remarks about an unnamed former union member, that Paff indicated he was going to get rid of that person, and that Beyer, Jr., believed Paff was referring to May. Immediately after receiving this call, May called Marty Cook and reported what Beyer, Jr., had told him. May additionally reported that Beyer, Jr., stated that he was not going to work for "those guys," that he was just there to waste their time.¹²

At the same time that Wagner contacted Wilson, Forster, Cain, and Abbott regarding applying at Flame, he also contacted Tom Haun, business agent of Local 24. He and Haun agreed that Local 24 would send some of its members to apply for work with Respondent; however, these individuals would not reveal their union affiliation. Consistent with this plan, Haun sent Fred Lilienthal, Frank Thoms, and James Shaw to apply with Respondent. Lilienthal and Thoms attached resumes to their applications, and Lilienthal included a letter of reference.

Lilienthal completed his application on July 28 and was interviewed by Paff on the same day. I do not credit Lilienthal's testimony that, at the interview, Paff asked if he was in the Union or whether he had ever been in the Union. I credit Paff's testimony that he asked Lilienthal whether he knew anyone in the Union, which in Baltimore would have meant Local 11, in order to determine whether there was anyone he could contact as an additional reference. Paff was impressed with Lilienthal's reported ability to read blueprints and past supervisory experience in supervising a crew of 11. Lilienthal's application is false in that it reports that he was referred by "advertisement," when in fact he was referred by business agent Haun. Lilienthal also omitted his then current employer, Lyndale Construction, where he was being paid at union scale since Lyndale, although a nonunion contractor, was performing a prevailing wage project. Lilienthal showed only AAA Insulators at a wage of \$14.00 per hour as his last employer. A few days after the interview, Paff called Lilienthal and offered him a job. Lilienthal reported to a job site at Georgetown University where Paff walked with him through the project showing Lilienthal what needed to be done. After three and one half hours, Lilienthal left the job site without calling Paff. He never returned. Respondent called and asked Lilienthal if he was going to return to the job. Lilienthal stated that he was not.

¹² Both May and Beyer, Jr., acknowledge that Beyer, Jr., called May to advise him that Paff had made a statement that Beyer, Jr., interpreted as dissatisfaction with the work of May. Both denied the additional comment regarding the absence of any intention on the part of Beyer, Jr., to work for Respondent. Although this statement is clearly hearsay as to Beyer, Jr., I credit Cook and Paff that they did receive this report from May. Thus, they did not expect Beyer, Jr., to report to work on August 7, and they were not surprised when he did not report.

Thoms completed his application on July 27. Respondent did not call him for an interview. Thoms called Respondent during the first week of August and learned that his application had been misplaced. He was told that he would be called when it was found.

5 Thereafter he received a call from Respondent and was asked to come to an interview. Paff and office manager Dean Wallace interviewed Thoms on August 8, four days after Lilienthal had walked off the job and the day after Beyer, Jr., had failed to report to work. In the interview, Paff confirmed that Thoms would not mind training employees who had less experience than he, and that he also was willing to provide transportation.¹³ Thoms was hired and told to report to the Georgetown University job site the next day. Thoms worked for Respondent for 10 days on at least three job sites. On several of these days, he wore clothing that bore union insignia and spoke with employees about the Union. There was no interference with this exercise of his Section 7 rights. Thoms advised Wagner that Respondent was hiring employees. On August 22 Thoms, at Wagner's direction, went on strike.

15 Shaw completed his application on July 25. He requested an interview that day, explaining that he had driven some distance to make application. Paff interviewed him, and Zoch joined Paff in the course of the interview. Shaw requested \$14.00 an hour, but Paff was unwilling to pay him this amount. Paff asked no questions relating to union affiliation. When Shaw did not hear from Respondent, he called on numerous occasions, speaking to Paff at least once before mid-August. Paff told him that he was not sure if he was going to hire anyone. Respondent had again advertised for insulators from August 15 through 20. Shaw again called Respondent and was told that Respondent would get back with him. Thereafter he called the number given in the advertisement, and, upon confirming that he had reached Respondent, hung up. A couple of days later he received a call to come to work. He indicated that he could not start until Monday. Ultimately he went to work on Tuesday, August 29. He reported to the job site wearing a union hat and shirt. Haun and Wagner were present at the job site with him.¹⁴ Shaw worked one half of a day. At lunch, Shaw went on strike. When he reported to work, Shaw was carrying with him a document stating that he was on strike. Wagner admitted that he directed Shaw to strike. Shaw admitted that, although he accepted a job, he had no intention of working for Respondent.¹⁵ When questioned by Counsel for Respondent, Shaw acknowledged that he falsified his application and that he felt that the false information he put down was justified because he was there "on a mission."

35 On July 27, insulation mechanic John Grabowski, whose application reflects his four years of apprenticeship with Local 11, was interviewed by Paff. He was recommended by Cook

40 ¹³ I do not credit Thoms' testimony that Paff asked if Thoms knew Wagner, and that Cook interrupted saying that he would not know Wagner because of his address. Cook was not present when Paff interviewed Thoms.

¹⁴ General Counsel's argument regarding Grabowski's testimony that he was "surprised" at Shaw's presence since Respondent was a nonunion company that, to his knowledge, did not hire union organizers, neglects to mention the presence of both Haun and Wagner at the job site with Shaw. Grabowski, an employee, did not participate in hiring.

45 ¹⁵ Shaw engaged in similar conduct in 1997 when he applied for work at M & M Insulation, Inc. He represented that he had a friend who also wanted to apply. The friend was business agent Wagner. After being offered a full time job, in May 1997, Shaw and Wagner responded that they could not start as full time employees immediately, but could begin as part time employees and begin as full time employees a week later. They worked for one day as full time employees, demanded a \$10.00 an hour raise that was not granted, and never thereafter reported to work.

and was hired on July 27.

On July 27, Eugene Ruff, whose application reflects his affiliation with Local 11, applied for work with Respondent. Ruff had been an instructor in Local 11's apprentice training
 5 program.¹⁶ His membership lapsed in May 1995. Ruff was recommended by Dave Jacobs, a current employee of Flame. He was hired on July 27.

Paff, Cook, and office manger Dean Wallace discussed the Local 11 applicants who had been interviewed, as well as those whose applications had been submitted by Wagner.¹⁷ As
 10 already noted, Paff was impressed with Forster and Cain. Although Cook had not been involved in the interview of Wilson, he had worked with Wilson. Cook considered Wilson's quality to be good, but his speed was poor. Cook was also aware that Wilson had a problem with his temper. Abbott lacked significant experience, having only recently completed his apprenticeship. Cook had worked with the remaining applicants and he apprised Paff of his opinion that Spurlock was
 15 unproductive, Neal was limited to working on the ground since he could not climb ladders or scaffolds, and Booz's speed was unacceptable, although his quality was passable. Regarding Beyer, Sr., Cook noted a personal situation, a family problem that resulted in no more than a dozen words being spoken between them in 22 years, as well as his opinion that Beyer, Sr., was unproductive.

Paff had additional information regarding some the applicants. Spurlock, at a local
 20 carnival in June, has mentioned to Paff that he had heard that Respondent had hired Cook and Zoch. He stated that he would not work for Stanley Zoch. Paff had worked with Neal, and he was aware of Neal's physical limitations. Paff had observed Beyer, Sr., sleeping on one job.

Paff attempted to contact both Forster and Cain, but was unsuccessful. He decided to
 25 interview Al Beyer, Jr., with whose work he was familiar. As a result of the conversation regarding the other applicants whose applications Wagner had sent in, Paff and Cook decided there was no need to interview them. As of August 4, Flame had, consistent with the four or five
 30 potential hires Paff had mentioned to Wilson, hired Grabowski, Ruff, Lilienthal, and Beyer, Jr.¹⁸ On August 4, Paff and Wagner had a telephone conversation in which Paff repeated to Wagner that he was interested in Forster and also stated his interest in Cain.¹⁹ Paff again attempted to reach Forster after this conversation. Wagner called no one.²⁰

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¹⁶ Business agent Wagner questioned Cook about Ruff. Cook testified that he had not been involved in the decision to hire Ruff, and he acknowledged that "in the past" Ruff's work habits had been poor. Wagner asked no further questions. Since Cook was not involved in hiring Ruff, I make no inference regarding Cook's opinion. In view of the Union's use of Ruff as an
 40 instructor, it would appear that there is no contention that he was unqualified.

¹⁷ General Counsel, citing the testimony of Stanley Zoch, argues that Respondent's
 45 interviews were a charade, that interviews were unnecessary when "Flame was familiar with an individual's work habits." Zoch could identify only Althoff and Jacobs, the two employees who came to Flame from Craftmen with himself and Cook, as being hired without an interview. He acknowledged that "Drew and Marty normally took care of all the hiring."

¹⁸ Although Cook and Wallace testified that Respondent was seeking to hire two or three employees, Paff did not deny that he stated four or five when he interviewed Wilson.

¹⁹ General Counsel's brief places this conversation on or after August 7. My review of Paff's testimony confirms that it was on August 4. Had it been after that, I am satisfied that there would have been discussion regarding Beyer, Jr.'s, failure to report to work.

²⁰ General Counsel, in brief, refers to the hire, prior to August 10, of D. Lansinger and R.

Continued

Stanley Zoch, Respondent's former chief estimator, was fired by Paff in June 1996 when Paff learned that he had covertly started a competing business. Called by General Counsel, Zoch testified that, after receiving the applications from the Local 11 members, Paff stated that "they would not work at Flame." In later testimony, after being confronted with a memorandum, dated August 8, memorializing a telephone conversation with Wagner, Zoch amended this statement to add that Paff said that "if they were hired . . . , it was going to be at a very low salary." I do not credit Zoch's testimony. He admits that he unsuccessfully attempted to reach Cain. The memorandum of the telephone conversation states that Zoch told Wagner that Flame "was looking to hire some of the people that are members of Local 11." He then asked Wagner about having his brother, who was a member of Local 11, come to work at Flame "with the other members."²¹ Wagner replied that "he would not let my brother . . . come to work," and went on to state that he had "plans for the people sent to Flame Contracting, Inc., and David [Zoch] was not part of this."²² If, as Zoch asserted at hearing, Paff stated that Local 11 members would never work at Flame, there would have been no reason for Zoch to have tried to reach Cain or to request that his brother be referred. Paff credibly denied making any such statement. Documentary evidence establishes that at least five insulation mechanics working for Respondent in early August were earning \$11.00 per hour, the lowest figure mentioned to any applicant from Local 11.

The only Local 11 applicants who made any attempt to contact Respondent, either after submitting an application or after being interviewed, were Abbott, Neal, and Spurlock. Abbott called one time. The telephone was not answered. He never tried again. Neal called Respondent's office a couple of days after Wagner had submitted the five applications. The person he reached did not know anything about the application and told Neal he should call back. Neal did not do so. Spurlock called only once, between August 2 and 5, and was told that Respondent was not hiring "right at this time."²³ He never called again. Respondent typically tries to contact people "a handful of times." As office manager Wallace observed, if applicants are really interested in work, "they're going to contact you back."

On August 10, Respondent was asked to take over a job at the National Institute of Health (NIH). Paff told the contractor that was being removed from the job that he was willing to hire his employees. Respondent began receiving calls from those employees, and it hired several of them. Additionally, Respondent sought to contact individuals that had previously worked for Respondent. No additional attempts were made to contact any of the Local 11 applicants since Beyer, Jr., after being hired, had failed to report on August 7 and no other Local 11 applicant had, to Respondent's knowledge, attempted to contact Respondent. Office manager Wallace did not consider the applicants "to be sincere in wanting to work for us." Paff

Merritt, neither of whom were discussed in testimony. Payroll records reflect that these individuals were paid \$8.00 per hour. General Counsel has not established that these individuals were insulation mechanics rather than helpers.

²¹ On August 8, Respondent's daily time sheets reflect that D. Zoch worked for eight hours. Thus, it would appear that Stanley Zoch had already put his brother to work when he called Wagner. August 8 was the only day D. Zoch worked. General Counsel elicited no testimony from Stanley Zoch regarding this. The record does not establish whether David Zoch was a qualified insulation mechanic or a helper.

²² The memorandum does not reflect why David Zoch was not a part of the unspecified plans to which Wagner referred.

²³ Spurlock testified that he called "[m]aybe a week, ten days," after applying. His application is dated July 26.

had no reason to contact the Local 11 applicants because they had shown no interest that they wanted to work; they had not called back. Cook noted that Respondent had determined not to hire several of the applicants, that “some [Forster and Cain] didn’t call us back, and Al Beyer. Jr., never showed up.” Wagner, having accompanied Thoms and Shaw to the job sites at which he directed that they go on strike, was aware of the work that Respondent was performing. Indeed, the one half day that Shaw worked was at the NIH project. Wagner did not direct Forster, Cain, or any other member of Local 11 to contact Respondent.²⁴

C. Analysis and Concluding Findings

This “salting” case is unusual in that Respondent’s president, Drew Paff, and Local 11’s business agent, Keith Wagner, have known each other for about 15 years. Furthermore, Respondent’s field superintendent, Marty Cook, was familiar with the work of almost all of the applicants who are alleged as discriminatees because he worked with them when he was a member of Local 11.

The complaint alleges that Paff, on July 27, “implied . . . he would not hire union members, because they . . . could cause him to lose his business or his home.” This allegation is predicated upon Respondent’s interview of Wilson, which actually occurred on July 26, in which Paff commented that he had worked hard to get where he was and he was going to hire four or five people that were “not going to do any harm to his company or his house.” Wilson admitted that, in the interview, there was no discussion of union members, as opposed to nonmembers. Paff told Wilson, in response to his statement that he was going to organize, that his activity presented no problem. In view of the foregoing, I fail to see the basis for any inference that Paff’s comment related to not hiring union members. Indeed, on the day following this interview, Paff hired Grabowski, a union member, and Ruff, a former apprentice instructor. Thus, I find that Paff did not violate Section 8(a)(1) of the Act when he stated he wished to hire people that would not harm his company or his house.

In regard to the complaint allegation that Paff interrogated employees regarding their membership in Local 11 and Local 24, I have not credited Lilienthal’s testimony that Paff asked whether he was a member of a union or had ever been a member of a union. Paff admits asking whether Lilienthal knew anyone in “the Union,” which in Baltimore would have been Local 11 of which Paff had been a member. Paff testified that he regularly asks such a question in order to obtain additional references regarding potential employees. As in *JAMCO*, 294 NLRB 896, 899 (1989), Paff’s question was not accompanied by any threat or statement indicating opposition to the Union.²⁵ Indeed, the record reflects that Respondent regularly hired known union members. Noncoercive questions that relate to the experience of applicants do not violate Section 8(a)(1) of the Act. I find no coercion associated with Paff’s casual question, and

²⁴ Wagner did not testify to taking any affirmative action on behalf of the Local 11 applicants, other than overseeing the initial applications. Despite his involvement with Thoms and Shaw, who were not members of Local 11, Wagner reported no attempt to call Forster or Cain on August 4, after Paff confirmed his interest in them, or after he directed Thoms and Shaw to go on strike. He testified that, to his knowledge, they did not contact Respondent.

²⁵ The holding in *Aloha Temporary Services*, 318 NLRB 972 (1995), cited by General Counsel, is not inconsistent with *JAMCO*. In *Aloha*, the respondent’s owner and president sought to confirm whether an applicant knew two other applicants in the waiting room, both of whom had identified themselves as union organizers. Upon receiving a negative response, respondent’s owner directed the applicant not to discuss their interview with anyone in the waiting room. In those circumstances, the administrative law judge found coercion. *Id.* at 975.

consequently I find no violation of Section 8(a)(1) of the Act.

5 The complaint alleges two additional Section 8(a)(1) violations, an interrogation when Paff allegedly asked Thoms if he knew Wagner, and an alleged threat of termination if Beyer, Jr.'s, organizing activities became "ridiculous." As discussed above, I do not credit either Thoms or Beyer, Jr., regarding these comments that they attributed to Paff. Thus, I find no violation.

10 The record reveals three categories of union affiliated applicants who applied for work with Respondent in the summer of 1995. The first includes union members who were recommended by current employees of Respondent, May and Grabowski, and former union member Ruff. They, on their own, sought employment with Respondent. They did not hide their union affiliation. They were hired. The second category of applicants were union members affiliated with Local 24. These applicants applied at the behest of the business agent of Local 24, Tom Haun, who had agreed to work with Wagner to have members of Local 24, with whom Respondent was not familiar, file applications that did not reveal their union affiliation. Lienthal attached a resume and a letter of recommendation to his application. He reported that he could read blueprints and supervise a crew of 11. He was interviewed on July 28, the same day as Forster and Cain. He was not offered employment immediately. Rather, as with Respondent's attempt to contact Forster and Cain, he was called a few days after the interview. Thoms' application had been misplaced and was not retrieved until he telephoned Respondent to find out the status of his application. Shaw was not hired until he had made numerous follow up phone calls after his interview. The third category of applicants were union members affiliated with Local 11 who filed applications at the behest of Wagner. Of these, Respondent attempted to hire Forster and Cain, and actually hired a third, Beyer, Jr.

25 Regarding Respondent's alleged refusal to consider for hire, and to hire, the eight alleged discriminatees, I shall use the analytical framework set out in *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979). In that case, the Board noted the elements of (1) the employment application by each alleged discriminatee, (2) the refusal to hire each, (3) a showing that each was or might be expected to be a union sympathizer or supporter, (4) a showing that the employer knew or suspected such sympathy or support, (5) that the employer maintained animus against such support, and (6) that the employer refused to hire the applicants because of such animus. Regarding the final element, under *Wright Line*,²⁶ the Respondent can rebut General Counsel's prima facie case by showing that, notwithstanding the protected conduct, it would have taken the same action.

40 There is no issue regarding the application, union affiliation of the Local 11 members, and Respondent's knowledge of that affiliation. As to Forster and Cain, there is no probative evidence that Respondent refused to hire them. The credited evidence establishes that Respondent, following its normal procedures, attempted to offer them employment. Paff telephoned Forster several times, but the telephone was not answered. Cain failed to receive a message to call Respondent. Neither of these applicants ever called Respondent to determine the status of his application.

45 In viewing the foregoing evidence, I am struck by affirmative efforts of Thoms and Shaw to obtain employment, and the absence of any such efforts by the Local 11 applicants, or by Wagner, to follow up on their applications. Three took perfunctory actions. Abbott called Respondent's office and received no answer. He never called back. Neal was asked to call back, but did not do so. Spurlock, after being told by someone whose name he did not obtain

²⁶ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

that Respondent was not hiring “right at this time,” never called back. The contrast between the inaction of the Local 11 applicants and the persistence of Thoms, who called to inquire about his application and was not interviewed until after volunteer union organizer Beyer, Jr., was hired but failed to report to work, and Shaw, who continued to call Respondent even though he had been told by Paff that he was not sure whether he was going to hire anyone, give credence to office manager Wallace’s observation that applicants who are interested in work “are going to contact you back.” No Local 11 applicant attempted to contact Respondent on or after August 7, the date Beyer, Jr., failed to report to work. There is no evidence that Respondent treated Forster and Cain any differently from other applicants.

With regard to the alleged discriminatees to whom Respondent did not offer employment, I find that the record fails to establish animus on the part of Respondent because of their union affiliation or stated intentions to engage in organizational activity. I have found no violation of Section 8(a)(1) of the Act. Respondent hired known union members before and after the alleged discriminatees applied for work. Beyer, Jr., an acknowledged volunteer union organizer, was hired and failed to report to work. Paff told Wilson and Abbott that he had no problem with their planned organizational activities so long as they restricted it to their own time, break time, and lunch time. Forster testified that, after stating his intention to organize, Paff said he would call him. Cain, after stating that he would be organizing on his own time, acknowledged that Paff told him that his planned activities presented no problem. Respondent attempted to offer employment to both Forster and Cain. Thoms, who worked for 10 days before going on strike, testified that he engaged in organizational activity at the job sites to which he was assigned. He reported no interference with that activity by Respondent.

Even if I were to assume animus, the record establishes that Respondent had a nondiscriminatory basis for failing to hire each of the applicants to whom employment was not offered. Paff, having discussed the applicants with Cook, was aware that Wilson “had a temper,” and Abbott lacked significant experience, having only recently completed his apprenticeship. Paff and Cook decided that it was unnecessary to interview Spurlock, who had told Paff he would not work with Zoch and whom Cook considered unproductive, Booz, whom Cook had reported lacked sufficient speed, Neal, who could not climb ladders or scaffolds, or Beyer, Sr., with whom Cook had a long-standing personal matter. I find that, even if I were to assume animus, the union affiliation of these applicants and their stated intentions to be volunteer union organizers played no part in Respondent’s determination not to hire them.

I am mindful that, when Respondent assumed responsibility for the National Institute of Health (NIH) job on August 10, it needed additional employees. General Counsel argues that Respondent’s failure to attempt to contact the Local 11 applicants establishes that they were discriminated against. In this regard, I have credited the testimony of Cook, Paff, and Wallace, that since no applicant from Local 11 ever called back, they assumed that they were not interested in working for Respondent. Wagner directed Thoms to strike on August 23 and directed Shaw to strike, at the NIH job, on August 29. Thus Wagner knew that Respondent had at least two vacancies. Despite this, Wagner did not call Forster, whom Paff said he was going to hire, Cain, or any other member of Local 11, and suggest that they follow up on the applications they had submitted. Shaw, despite his intention not to work for Respondent, had been calling Respondent persistently and again called on August 21 when he returned from vacation. The former employees of the contractor who had been put off of the NIH job were also calling Respondent. Thus, I find no basis for determining that Respondent’s failure to again attempt, after August 10, to contact Forster and Cain, or any of the other Local 11 applicants that Respondent had determined not to hire some two weeks earlier, establishes that they were discriminated against. The continuous efforts of Shaw to obtain employment confirm Respondent’s contention that, if an applicant is serious, he will call back. There is no evidence

that the Local 11 applicants, none of whom even sought to contact Respondent after August 7, were treated any differently from Thoms or Shaw, who did not reveal their union affiliation until after they were hired. There is no probative evidence of disparity.

5 The record does not establish animus. There is no probative evidence that Respondent
refused to consider for hire, or refused to hire, these applicants, because of their union
affiliation or organizational intentions. Of the five applicants interviewed, Respondent sought to
hire three. Forster's telephone was not answered. Cain failed to receive a message to call
Respondent. Neither of these applicants ever called Respondent to determine the status of his
10 application. Beyer, Jr., who is not alleged as a discriminatee, was hired but never reported to
work.

Conclusions of Law

15 The Respondent has not violated Section 8(a)(1) and (3) of the Act as alleged in the
complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended²⁷

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C. November 5, 1997

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George Carson II
Administrative Law Judge

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²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.